

EXHIBIT 6

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ARGUMENT

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 THE OHIO PUBLIC EMPLOYEES
4 RETIREMENT SYSTEM, et al.,

Plaintiffs,

v.

03 CV 4261 (JES)

6 FEDERAL HOME LOAN MORTGAGE
7 CORPORATION, et al.,

8 Defendants.

9 -----X

10 New York, N.Y.
11 March 31, 2006
12 3:45 p.m.

Before:

13 HON. JOHN E. SPRIZZO,

District Judge

14 APPEARANCES

15 BERSTEIN, LITOWITZ, BERGER & GROSSMANN, LLP
16 Attorneys for Plaintiffs The Ohio Public Employees
17 Retirement System and State Teachers Retirement System
of Ohio

BY: DANIEL LAWRENCE BERGER

18 -and-

WAIDE, SCHNEIDER, BAYLESS & CHESLEY CO., L.P.A.

19 BY: STANLEY M. CHESLEY

JAMES R. CUMMINS

20 MELANIE S. CORWIN

21 COVINGTON & BURLING

Attorneys for Defendant Federal Home Loan Mortgage
22 Corporation

BY: C. WILLIAM PHILLIPS

23 NANCY KESTENBAUM

24 PROSKAUER ROSE, LLP

Attorneys for Defendant Leland C. Brendsel

25 BY: KENNETH EARL ALDOUS, JR.

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1 APPEARANCES (CONT.'D)

2 GIBSON, DUNN & CRUTCHER, LLP
Attorneys for Defendant Gregory Parseghian
3 BY: JOSHUA D. HESS

4 FRIED, FRANK, HARRIS, SHRIVER & JACOBSON
Attorneys for Defendant David Glenn
5 BY: ALEXANDER R. SUSSMAN

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1 (Case called)

2 (In open court)

3 MR. BERGER: Good afternoon, your Honor. We are
4 colead counsel for lead plaintiffs, Public Employees Retirement
5 System of Ohio and the State Teachers Retirement System of
6 Ohio.

7 The parties in this case have been -- it's been
8 sometime since we've seen your Honor, but we have engaged in
9 massive discovery. Over 74 depositions have been taken, and 7
10 million pages of documents have been produced and reviewed.
11 And depositions are going on on a continuous basis, and
12 Mr. Chesley will fill you in on the status of the case, if your
13 Honor wants, after the argument

14 THE COURT: Both merits and class action discovery?

15 MR. BERGER: Yeah, everything, your Honor, yes.

16 So we're here seeking certification of the class and
17 the appointment of class plaintiffs and colead counsel for the
18 class. We urge in our papers, and certainly in our amended
19 complaint, your Honor, a class period of July 15, 1999. That's
20 when Freddie Mac issued its second quarter '99 results through
21 June 6, 2003.

22 June 6th, to put it in context, your Honor, is the
23 last trading day before Freddie Mac announced on June 9th
24 before the opening that it had fired its entire senior
25 management, including --

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1 THE COURT: Maybe I should hear from them first since
2 they're objecting.

3 MR. BERGER: That would be fine. That would be fine,
4 your Honor. I think --

5 THE COURT: You can respond to what they say. Class
6 action motions are kind of odd, because basically it's the --
7 it's their objection --

8 MR. BERGER: Yeah. It's just to put -- if I can have
9 30 seconds just to put it in context, your Honor. Clearly,
10 your Honor has sustained the amended complaint. We're just
11 urging a class period that is in the amended complaint.

12 The defendants are in two counts. There's the
13 individual defendants. There's Freddie Mac. And it's the odd
14 case -- I've actually never encountered it before -- where the
15 defendants are arguing for two different class periods, one
16 shorter, one longer. So I suppose, you know, the story of
17 Goldie Locks --

18 THE COURT: But I don't have the power to make that
19 judgment without getting into the merits.

20 MR. BERGER: I'm sorry, your Honor?

21 THE COURT: What I'm really saying is that the Court
22 can't make that decision as a matter of law because some of
23 these issues are intertwined with the merits.

24 MR. BERGER: Yeah. I think that will certainly -- we
25 would say the same thing, your Honor. We would say basically

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1 that the class period that we have chosen, after doing a very
2 detailed investigation, is the appropriate class period in this
3 case. We don't represent anyone other than those people,
4 investors, who we are seeking to represent, and that class
5 period ends on June 6th. And so --

6 THE COURT: Yeah, but the big argument is that earlier
7 you said at the end of July was the class date.

8 MR. BERGER: Well, that's not entirely true, your
9 Honor. For the lead plaintiff -- well, first of all -- I think
10 what you're referring to, Judge, is the lead plaintiff hearing.

11 THE COURT: In effect, the status of lead plaintiff in
12 opposition to another group that was contending for the same
13 spot, you rely upon a different date than the one you're urging
14 upon me now, and I guess since you've got a benefit by taking
15 that position -- because I think you sell or purchased after
16 the -- did you buy some stock after the June 6th date?

17 MR. BERGER: On June 9th, one of our plaintiffs bought
18 stock, your Honor.

19 THE COURT: All right. So they were arguing that you
20 were not a representative of the plaintiff because of the
21 unique status having bought the stock after the June 6th date.
22 I'm saying you say no; you said it was July. Now, having
23 gotten the benefit of being the lead plaintiff, by taking that
24 position, I guess their position is that -- although they don't
25 argue it in these terms, but it's a kind of litigation estoppel

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1 here. Having gotten the benefit of taking one position, now
2 you're seeking to take another, which you shouldn't be allowed
3 to do.

4 MR. BERGER: There's three responses to that, if I
5 can, your Honor --

6 THE COURT: -- estoppel, but technically that's what
7 they seem to be raising.

8 MR. BERGER: Your Honor, at the lead plaintiff stage,
9 there were -- well, there's three responses to that. First, I
10 think the same -- the defendant that's arguing for a class
11 period of November 21, 2003 is the same defendant and saying
12 that, you know, that that's the appropriate class period has
13 also taken contrary positions in this case. For example --

14 THE COURT: Yeah, but they have a benefit from it.

15 MR. BERGER: Excuse me?

16 THE COURT: Well, they're not obtaining a benefit by
17 taking this position. You are lead plaintiff. Right?

18 MR. BERGER: Yeah. But by asking to extend the class
19 period to embrace people who purchased stock after June 6th,
20 what they are saying is that all investors who purchased up to
21 November 21 should be included in the class. Our client
22 purchased 117,000 shares on June 9th, and those shares are not
23 included in the class. And when we argued for the lead
24 plaintiff motion, clearly, okay, it was our belief at that
25 time -- we did not do an investigation into what the

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1 appropriate class period was. We did not do it because we
2 weren't appointed lead plaintiff.

3 THE COURT: But now you're saying June 6th, which
4 subjects you to that unique defense.

5 MR. BERGER: But, your Honor, it's not a unique --

6 THE COURT: If June 6th is the date where the class
7 period ends, then you bought after the class period was over.
8 You bought or you sold?

9 MR. BERGER: We bought, your Honor. Well, the stock
10 had already fallen so --

11 THE COURT: So June 6th is the date that you are in a
12 situation where maybe you're not typical of a representative of
13 other members of the class.

14 MR. BERGER: But, your Honor, there are any number of
15 cases, any number of class certification cases where class
16 plaintiffs buy after the close of the class period because the
17 stock has already fallen. Nobody is claiming that Freddie Mac
18 is an inherently fraudulent enterprise. Nobody is arguing
19 that. My God, they support millions and millions of mortgages
20 throughout the country. So nobody is arguing that. The stock
21 had lost over 20 percent of its value at that time. The
22 artificial inflation was out of the price of the stock at that
23 time --

24 THE COURT: Well, that may not be true because they
25 say -- these depositions in this case even from your own

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1 witnesses say, well, there was a continuing stream of
2 information coming out, you know, and we didn't know it all in
3 June. I mean, they quote depositions of your own people saying
4 that, so how can I find as a matter of law that the period is
5 June 6th?

6 MR. BERGER: I don't think you need to find as a
7 matter of law that it's June 6th, your Honor. Let me just
8 explain that.

9 But let me first respond to the representatives and
10 the plaintiffs who will testify. There's never an end to the
11 information that comes out about a company, particularly in
12 this case. Freddie Mac, there's information that comes out
13 every week which --

14 THE COURT: But November everything was out.

15 MR. BERGER: That's not true. Every week there's
16 additional information that comes out. All we're saying is
17 that the curative disclosure based upon our thorough
18 investigation and detailed research -- we didn't just pick this
19 date out of the air. We picked it as fiduciaries for the
20 entire class. The curative disclosure in our view that not
21 only corrected the misinformation before but eliminated the
22 artificial inflation from the price of the stock, okay, it
23 eliminated the artificial inflation, and it no longer allowed
24 any investor to rely upon the misinformation that preceded that
25 into the marketplace, came out in --

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1 THE COURT: Well, let's assume the jury doesn't accept
2 your argument. Suppose the jury accepts your argument that the
3 curative date is sometime in November, which is the jury's
4 question. It's not my question. I can't make that decision.
5 And I'm saying to you that suppose the jury finds in November.
6 What happens to all those people that bought after June 6th but
7 before November?

8 MR. BERGER: Your Honor, every one of them -- our case
9 is very widely known. Any investor -- this is a very widely
10 held stock throughout the world. Any investor who chose to
11 could have filed a case for those people who purchased between
12 the period June 9th and November 21, anyone. Nobody has done
13 that in all of the years that this case has been pending.
14 Nobody has done that. Why? Because we don't think anybody
15 could because we don't think there's a claim.

16 Now, we're subject to rule 11. As your Honor has
17 reminded me on a number of occasions in the past, we're subject
18 to rule 11. Your Honor has sustained our complaint. We don't
19 represent those people. We have asserted no claim for them
20 post September 6th. We don't represent those investors, and we
21 feel that if we did bring a case for those investors, we would
22 be diluting whatever recovery we would have, and we believe
23 that it would not be a cognizable claim. So we don't believe
24 in that claim as lead plaintiffs for the class.

25 So as I'm saying it --

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1 THE COURT: What's changed between the time when you
2 took the position that the date was the end of July as opposed
3 to now when you say it's June 6th or June 9th? What's changed
4 in the meantime?

5 MR. BERGER: We've done and we were --

6 THE COURT: What have you discovered that leads you to
7 conclude that the June 6th date is nothing more than the fact
8 that that's when the stock suffered its biggest drop? You knew
9 that back then. You've known that all along.

10 MR. BERGER: We knew what the announcement was on June
11 6th, your Honor, but we didn't know what else was going to be
12 coming out.

13 THE COURT: But you knew the market impact as of June
14 6th.

15 MR. BERGER: I know, but we didn't know what else was
16 going to be coming out after that time. In other words, there
17 could have been disclosures months, six months --

18 THE COURT: When was the date it was filed? January
19 of 2004? Well, that was after November. It had already come
20 out. So you knew that then.

21 MR. BERGER: August 2003, your Honor.

22 THE COURT: By the time we heard the motion,
23 everything was out.

24 MR. BERGER: Well, your Honor, nobody knew what it was
25 that was going -- whether there was going to be another big

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1 shoe that was going to drop even bigger than the shoe that
2 dropped on June 6th. Nobody knew that at the time. Okay.
3 There could have easily --

4 THE COURT: But you knew that as of the time the
5 motion was made the last time for lead plaintiff status. That
6 was sometime in 2004, wasn't it?

7 MR. BERGER: Yeah, but we don't believe, your Honor --
8 the way we look at what happened here -- because the defendants
9 want to include that later period in the class. When we look
10 at what happened here, we, because we are fiduciaries to the
11 class, eliminated from our class, consciously chose to
12 eliminate from the class --

13 THE COURT: But the problem is if you had taken the
14 position on the lead plaintiff application that the cutoff date
15 was June 9th or 6th, you would have been subject to a unique
16 defense, right, that you bought after the class action date?
17 Correct?

18 MR. BERGER: No. I don't think so, your Honor. I
19 think it happens all the time that --

20 THE COURT: Yeah, but it still puts you in a different
21 category than the people who did not buy a large amount of
22 stock after the class action date.

23 MR. BERGER: Well, that's true, but what we would say
24 is we say very often because --

25 THE COURT: I know that, and you're right. I could

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1 have said that doesn't subject you to a unique defense. But
2 why did you choose to go that way, except to make sure of the
3 fact that you would not be subject to a unique defense
4 argument? So you took a legal position that was designed to
5 give you a maximum benefit, which was to eliminate any
6 possibility that your unique defense argument might persuade
7 me, and now you're coming in, after having gotten that benefit,
8 and saying, no, it's June 6th, because we've learned a lot
9 since.

10 You really didn't learn a lot since. June 6th or 9th
11 is based totally upon the fact that that's when the stock
12 showed the biggest drop in the market and when you claim all
13 the inflation went out. But you knew that back then, and you
14 could have met the defense head on by saying, you know, it's
15 not June 6th. It's July 25th. But it doesn't matter anyway,
16 because that's when it occurred, that's when the inflation went
17 the market, but June 6th -- hold it open till the end of July.
18 But you chose to eliminate -- I mean, it's a good legal
19 strategy. You destroyed their argument by taking that
20 position, and now you're taking the opposite position.

21 MR. BERGER: But, your Honor, they didn't make an
22 argument -- they don't have anything to say at the lead
23 plaintiff hearing. It wasn't the defendants here, and it
24 wasn't being done to gain an advantage at the lead plaintiff
25 stage to argue for a class period. It was believed at that

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1 time --

2 THE COURT: But the problem with the position you're
3 taking is -- this position has not really been briefed. You
4 maybe want to send me a short letter on the litigation estoppel
5 issue.

6 But you're now subject to another unique defense,
7 which is litigation estoppel that would not be available
8 against another member of the class, because your clients are
9 the ones who bought, and your clients are the ones who took
10 that position. And now your clients are going to be subject to
11 cross-examination at trial as to why the inconsistency between
12 one and the other, which creates another unique defense for
13 you, which may make you maybe not adequate of a typical class
14 representative. You're in the box one way or the other. But
15 if you take the other position back at the lead plaintiff stage
16 and met the argument head on -- and it doesn't make any
17 difference if we bought the --

18 MR. BERGER: Your Honor, the lead plaintiffs take very
19 different positions with regard to what the length of the class
20 period should be, and they do that based pretty much on their
21 best judgment, presumably, of what that class period should be.
22 But it's before any work is done in the case. It's before any
23 discovery.

24 THE COURT: I know. But these depositions would
25 certainly suggest that your people were not convinced that all

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1 the inflation was out of the stock yet.

2 MR. BERGER: That's not what those depositions say,
3 your Honor. What the depositions say is --

4 THE COURT: I read them.

5 MR. BERGER: Well, what it has to do with is the fact
6 that there are -- see, what happened on June -- just let me
7 tell you. What happened on June 6th is there was all this
8 disclosure where senior management was fired. OFHEO announced
9 that they were conducting a formal investigation. Two days
10 later the SEC announces that they're conducting a formal
11 investigation into these financial improprieties. Okay. The
12 stock loses 20 percent of its value, unprecedented.

13 From that moment on, there continued to be stories
14 every week that contain what could be disclosed as not such big
15 news and revelations about Freddie Mac. At no point in time
16 from June 6th on has there been any disclosure which created
17 a -- which had a dramatic or material effect on the price of
18 the stock.

19 THE COURT: I know, but those are issues for the jury.

20 MR. BERGER: Your Honor, they argue for June 21. On
21 June 21, the announcement that -- I'm sorry. November 21.

22 THE COURT: I'm not saying that either. I'm just
23 saying to you that the bottom line is that as I sit here now,
24 being asked to certify a class action period, there are issues
25 of fact that go to the question as to when the curative

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1 announcement was made that have to be resolved by a fact
2 finder; and according to what the Second Circuit has told me, I
3 don't have the authority to resolve it because it gets into the
4 merits.

5 MR. BERGER: I agree with that, and so the default
6 position, when that happens, your Honor, according to the
7 authorities, I respectfully submit is to accept it --

8 THE COURT: The larger class --

9 MR. BERGER: But is to accept -- but in each and every
10 one of those cases, your Honor, every single case that the
11 defendants cite asking for a larger class period was where the
12 plaintiffs urged a larger class period and defendants urged
13 a --

14 THE COURT: I know, but I have an independent
15 responsibility here. This is not one of those cases where the
16 parties make the decision as to whether or not or what the
17 class period should be. This is not a case where I can rely
18 upon the fact that you're not raising it, he's not raising it.
19 I've got an independent responsibility to certify a class
20 action period that's supported by the evidence.

21 MR. BERGER: Okay. Could I --

22 THE COURT: And in this record, I think I'm required
23 to choose the maximum class period and let the jury determine
24 if it was something less.

25 MR. BERGER: Let me just -- if I could just have two

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1 minutes, your Honor, to respond. I just want to say the
2 maximum -- let's talk about this maximum class period. Freddie
3 Mac is urging --

4 THE COURT: But the evidence will support that.

5 MR. BERGER: Freddie Mac is urging September 21 as the
6 class period. The --

7 THE COURT: September 21 of?

8 MR. BERGER: November 21. Excuse me.

9 THE COURT: November 21, 2003?

10 MR. BERGER: Right. The stock after November 21 was a
11 date -- November 21 was a date that was timed by Freddie Mac.
12 Think about the public policy implications of selecting a date
13 as the longest class period. That is the date that they
14 actually announced the details of the restatement. Now, they
15 could have done it on that date; they could have done it on any
16 date. I'm not suggesting that they did that in any kind of --

17 THE COURT: But that's a good argument for a fact
18 finder.

19 MR. BERGER: No. But they timed that announcement.
20 So now the stock went up on November 21. The stock actually
21 went up when they made that announcement. Why? Because all of
22 the inflation was out of the stock already. So when you talk
23 about --

24 THE COURT: I know, but --

25 MR. BERGER: Your Honor --

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1 THE COURT: Your argument is for a jury.

2 MR. BERGER: But the next thing they're going to say,
3 your Honor, is there's no loss causation as a result of it; and
4 so, therefore, there are no damages.

5 THE COURT: And I'm going to give them the same
6 answer, which that is a jury question.

7 MR. BERGER: But don't we as lead plaintiffs and lead
8 counsel for the class, don't we have a right to say --

9 THE COURT: You have the right to make a contention,
10 but I have an independent responsibility to see to it that the
11 class period is known now or that the evidence would support
12 it, and I have no basis to say a jury would find that it was
13 sometime after June 9th would not be rational.

14 MR. BERGER: But we can't do that in a vacuum, your
15 Honor.

16 THE COURT: Neither can I. That's the problem.

17 MR. BERGER: We can't do that in a vacuum, because we
18 have to make allegations between June 6th, 2003 and November
19 21. We have to make allegations --

20 THE COURT: But I haven't heard the evidence yet.
21 This case -- one thing the Court of Appeals makes very clear to
22 me is that I don't have the power on a class action application
23 to get into the merits, and when the curative this date was or
24 was not really is a question that goes to the merits and bears
25 upon the question of what the damages are. That is

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1 traditionally a fact-finding jury function.

2 Now, I cannot certify a class action date on the
3 assumption that it's highly probable that you're right that it
4 was sometime in June rather than in November. I have to
5 certify a class to establish anything that would be reasonable
6 for a jury to find under the evidence, and in this record I
7 can't say during those depositions that it would be irrational
8 for a jury to find it was sometime later than June 9th.

9 MR. BERGER: Okay. Your Honor, what will happen then
10 is we will then have to move to amend our complaint again,
11 which we had allegations for this period of time between June
12 6th and November 21. Okay. That we don't believe in.

13 Two, the individual defendants were urging a shorter
14 class period and have basically said that the curative
15 disclosure occurred, okay, earlier on January 9th -- on January
16 25th. They're going to say you should dismiss that part of the
17 complaint because the curative disclosure came out on January
18 25th. And we're in this morass of motions to dismiss again for
19 that later period --

20 THE COURT: But you're going to have to resolve all
21 the pleas.

22 MR. BERGER: But we don't believe that those people
23 have a claim because the stock was not -- there's two things to
24 look at in deciding what the end date for a class period is.
25 Most importantly is, okay, if we're not going to -- is that

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1 plaintiff's choice of the end of the class period should be
2 given the benefit of the doubt, unless as a matter of law the
3 defendants can establish that a different date is appropriate.
4 And so now --

5 THE COURT: But the Court of Appeals is not delivering
6 to me that message. The Court of Appeals doesn't say to give
7 the plaintiff the benefit of the doubt. The Court of Appeals
8 says the Court cannot get into the merits. What is the
9 curative date is going to be the subject, I'm sure, of a lot of
10 expert testimony at trial, market analysis and whatnot, all of
11 which is not for me. I can't determine that.

12 MR. BERGER: But your Honor has indicated, I think in
13 your own decisions, your Honor, and other judges in this court
14 have said that there are two things really to look at. What
15 constitutes a curative disclosure and what happens -- and the
16 price stock movement -- and your Honor said that yourself with
17 the AMA tobacco case. The price stock movement is a very
18 material factor there.

19 THE COURT: It's a very big factor. It's not -- but I
20 can't say that a jury finding that it was not that date is
21 irrational. That's what I have to be able to say to sustain
22 your argument.

23 MR. BERGER: But if the date proposed by the
24 defendants, your Honor, which I respectfully submit is --

25 THE COURT: The date they suggest may not be the date

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1 either.

2 MR. BERGER: I understand, but it's like the fox
3 guarding the chicken coop. When your Honor -- let's think
4 about this logically. When have you ever heard in your
5 judicial experience of a defendant arguing to expand the class
6 period to include more investors and more damages? It's
7 unheard of.

8 THE COURT: It's equally unheard of for a plaintiff to
9 be arguing for a shorter class period, and it's only here where
10 you picked that date because that's when your damages are
11 maximized.

12 MR. BERGER: No. We picked -- well --

13 THE COURT: That's what they say.

14 MR. BERGER: I understand --

15 THE COURT: -- but maximize the damages as of that
16 particular date; whereas, they might be less at some later
17 date.

18 MR. BERGER: So let's assume that we both have
19 subjective reasons for this doing this for the moment, but
20 let's take a look at the objective facts. Objectively, on
21 November 21, okay, when they made the announcement they made,
22 the stock went up. Objectively, on June 9th when they made the
23 announcement, okay, from June 9th through the next couple of
24 days, the stock was 20 percent of its value. Unheard of in the
25 history of Freddie Mac, never before, because it's "steady

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1 Freddie."

2 THE COURT: I know. These are all wonderful
3 arguments, but I can't accept them as a matter of law. I have
4 to --

5 MR. BERGER: I'm not --

6 THE COURT: As a matter of -- certify a class that
7 encompasses a larger period. If the jury finds this period is
8 correct, that it was sometime earlier, they'll make that
9 finding, and, fine, we're all be able to assess the damages
10 accordingly, but I can't do it myself. I don't have the power
11 to be a fact finder here, unless you all want to waive a jury.

12 MR. BERGER: It's not a question of finding as a
13 matter of law. I believe, your Honor, that nobody is being
14 prejudiced. Anyone --

15 THE COURT: You don't know that. See, what if class
16 notice goes out? Suppose I certify a longer class period.
17 When the class notice goes out, there may be no one who comes
18 in and opts to become part of the class action who bought after
19 July 21st or whatever date you're saying it should be, in which
20 event it's easy, because I won't have to worry about those
21 people. They're not in the class. But if they do come in,
22 they have to be given the opportunity to come in.

23 MR. BERGER: But let me address that. The class
24 notice goes out for a longer class period, your Honor. Class
25 members do not have to opt in. It's an opt out -- we do --

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1 these are opt-out classes. So the class members get a notice.
2 They're told that we represent a class going through November
3 21. Okay. And they can -- if they don't want to join it, they
4 can opt out. If they do nothing, they're in the class.

5 Now comes the end of the day. We settle the case,
6 okay, or we try the case, but we don't believe that there are
7 cognizable damages for that portion of the class. And so
8 what's happening is we will then be representing a portion of
9 this class that we don't believe has a cognizable claim. And
10 so what we're doing is we're disallowing someone from that
11 period to come forward and say, well, I think I have a claim.
12 You're not being represented. Okay. And I want to bring it.
13 So I'm going to bring my own case. I'm going to bring a case
14 for that period of time which --

15 THE COURT: -- any class shareholders.

16 MR. BERGER: Which anybody can do. Anybody can do
17 that. They can bring a class, and this way they will be
18 represented. Nobody -- so what I'm saying is, as a matter of
19 law, you are not prejudicing that portion of the class at all
20 because they are free -- everyone knows the class that we've
21 sued for. It's been a matter of public knowledge for quite
22 some time, and they could have come in now. They could have
23 come in before. When the notice goes out, anybody can say,
24 well, what about me? I bought my stock in, you know, July, in
25 August, in September, in October; I bought my stock later, and

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1 I think I should have a claim too. Any one of them can bring a
2 claim. And so what I'm saying is that no one is prejudiced,
3 and we believe that for the class that we are seeking to
4 represent, that the best claim for them --

5 THE COURT: Let's forget about the class. Let's talk
6 about your client first.

7 MR. BERGER: Okay.

8 THE COURT: If the class action is longer than you
9 claim it is and you bought the stock at a lower price after the
10 June period, your damages would have to be reduced by what you
11 recovered when you sold -- when you bought the stock at a lower
12 price. Right? You would have less damages.

13 MR. BERGER: We would still have damages on that
14 purchase --

15 THE COURT: You may not.

16 MR. BERGER: No. But, your Honor, we have damages
17 during the class period, significant damages during the class
18 period, very significant, and we would still have damages
19 beginning throughout our purchases --

20 THE COURT: But if the class period is longer, any
21 gains you might have made after the class period would have to
22 be part of the class period.

23 MR. BERGER: They would be anyway, because there's a
24 lookback, your Honor -- there's a lookback of 90 days -- after
25 the close of the class period, there's a --

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ARGUMENT

1 THE COURT: What's funny about these class action
2 cases is that the arguments that people make in them are always
3 dependent on where they happen to be economically at the
4 moment. If we had a statute of limitations problem with this
5 case, you'd be arguing for the later date and saying we didn't
6 have knowledge of the entire fraud until later. You'd be
7 saying --

8 MR. BERGER: Your Honor --

9 THE COURT: That's what the problem is with these
10 cases. So the plaintiffs say this or the defendants say that.
11 It all depends what they're interested in at the moment. I
12 used to be a lawyer too.

13 MR. BERGER: But, your Honor, all this means is that
14 we would have more shares in the class. Those purchases that
15 we made --

16 THE COURT: But you bought at a much lower price.

17 MR. BERGER: It was at a much lower price, but that
18 purchase -- if the class ended when they say it ended -- I have
19 never done the calculations --

20 THE COURT: The stock had not suffered a significant
21 loss thereafter -- I really don't know. I'm just talking
22 theoretically. If all the inflation that you say is out of the
23 stock, you bought it at a rock-bottom price and you're still
24 holding the stock for what it is worth now, more than you paid
25 for it, then you're better off having a shorter class period.

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ARGUMENT

1 That's all.

2 MR. BERGER: And I suppose just -- I mean, I hate to
3 repeat myself when I'm before your Honor, but I suppose what
4 I'm really saying is that I think there are subjective reasons
5 why we do things, clearly. A plaintiff is going to look at
6 their own situation; a defendant is going to look at theirs.
7 But I think --

8 THE COURT: Maybe you can reduce your damages.

9 MR. BERGER: But I think your Honor knows --

10 THE COURT: And you're both not going to win on this
11 issue. The jury is going to make a fact finding one way or the
12 other, and if the jury finds your date, he's gone.

13 MR. BERGER: Well, I suppose what is happening,
14 though, is that if we believe that the entire case would be
15 prejudiced by picking a later date, that it's not just an
16 incidental or immaterial choice. If we believe --

17 THE COURT: Then maybe you shouldn't be lead plaintiff
18 anymore.

19 MR. BERGER: But why, your Honor? In other words,
20 we're doing -- I think we're doing a pretty good job.

21 THE COURT: But you represent the whole class.

22 MR. BERGER: But what if somebody came in and said the
23 whole class should end a year later than that because there was
24 something else that was disclosed a year later, would they then
25 make that argument? In other words what --

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ARGUMENT

1 THE COURT: I haven't heard any argument that any
2 finding of a date after November would be rationally supported
3 by the evidence.

4 MR. BERGER: Well, I think they picked November
5 because the stock went up. I mean, there's been a lot
6 disclosed since that time --

7 THE COURT: But that surely --

8 MR. BERGER: I mean, and the individual defendants
9 picked a shorter class period because --

10 THE COURT: You see, the trouble with the stock market
11 is that it's such a fluid thing, you know. There's a
12 disclosure made, and maybe it's a complete disclosure, a part
13 disclosure. And it causes people to panic, sell the stock.
14 Other people, more clever investors say, well, maybe all the
15 inflation is not out of the stock yet. Let me go in and buy
16 some now so I can hedge against -- you know you buy cheap in
17 the hope that you can offset it and basically make a killing.

18 I mean, it's the stock market. People who are
19 sophisticated investors sometimes will buy when they think the
20 stock is undervalued under the theory that there's been a panic
21 out there which has caused a lot of people to dump stock they
22 shouldn't be dumping. And you're a smart guy and you know the
23 stock is worth more than the people that are currently selling
24 it for, so you go ahead and buy it.

25 Now, that doesn't necessarily mean the class action

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ARGUMENT

1 period is over or that all the inflation is out of the stock.
2 It may very well mean that, for one reason or another, the
3 inflation value has gone out, too, because of some investment
4 panic. It's not all that clear that that drop in the stock was
5 attributable to inflation in the stock. It may very well have
6 been attributed to investor panic when it started to drop, you
7 know.

8 MR. BERGER: That's absolutely true, your Honor. I
9 have no problem with that. And for that matter --

10 THE COURT: That's a jury question.

11 MR. BERGER: For that matter, just several weeks ago,
12 we resolved a case involving the largest -- one of the largest
13 companies in Canada, Nortel, and we had Nortel 2, were lead
14 counsel there; and someone else had Nortel 1, okay. And they
15 were different class periods but related. But when the Nortel
16 1 case was bought -- it was before Judge Berman. When that
17 case was brought, everybody thought, that's it for Nortel; all
18 the bad information is out.

19 And then there were additional disclosures which
20 resulted in filing a case in which we call Nortel 2. That case
21 is before Judge Preska, and both of those cases went forward
22 with different lead plaintiffs and different lead counsel,
23 which is certainly appropriate here. It can happen here easily
24 if they want to. And it's not -- it's just that that's not
25 the --

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ARGUMENT

1 THE COURT: But you see what the problem is, though.
2 Right?

3 MR. BERGER: I do. That's why I'm urging the Court to
4 just take a look at just the following, not what each of us
5 says subjectively, not what would benefit --

6 THE COURT: You see, if I certify the class to be when
7 you say it is, right, that means any evidence with respect to a
8 later period would have to be excluded at the trial, and what I
9 see out there maybe two years down the road, if the case ever
10 gets tried, the Court of Appeals would reverse Judge Sprizzo
11 and say, he was too narrow in his definition of the class. He
12 should have let a jury resolve this question. Go back and do
13 it again. I don't want that.

14 MR. BERGER: Your Honor, we would argue that the
15 details --

16 THE COURT: You could argue it, but the Court of
17 Appeals may say Sprizzo was wrong. He took too narrow a view
18 of the -- he didn't listen to us when we said he shouldn't
19 resolve the merits of the claim. But the bottom line is I
20 don't want to try this case twice.

21 MR. BERGER: Nor do we, your Honor. We certainly
22 wouldn't do that to you. I don't think -- I would respectfully
23 submit that a Court of Appeals cannot send back this case for
24 certifying a class period because nobody -- because every
25 putative class member who purchased from June 9 on has the

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ARGUMENT

1 right to come in and bring a claim. Everyone has a right. So
2 nobody's rights are being precluded, and nobody can say that --

3 THE COURT: Well, once I certify the class action, the
4 statute begins to run on those people.

5 MR. BERGER: But we're going to send out a notice, and
6 in that notice, it's going to say -- in that notice, it will
7 say or it can say plaintiffs urged the class period of June
8 9th --

9 THE COURT: It's not going to go out to people who
10 didn't buy or sell during the period that ended on June 9th.
11 It's only going to go to the people who bought or sold up to
12 June 9th. So the other people will never be notified about the
13 existence of the class action.

14 MR. BERGER: But we also publish --

15 THE COURT: They won't even be aware of the statute of
16 limitations.

17 MR. BERGER: We can send out the notice to them, your
18 Honor. It's not a problem to send out the notice.

19 THE COURT: If you send the notice out, you might as
20 well certify the class at a later date. I can't certify the
21 case as of June 9th and then send out notices to everybody who
22 bought up to November 25th. It would be --

23 MR. BERGER: I'm only responding to the fact that your
24 Honor --

25 THE COURT: Let me hear what they have to say.

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ARGUMENT

1 MR. BERGER: You're going to give me another little
2 shot at it?

3 THE COURT: I think we've covered most of the
4 problems.

5 MR. PHILLIPS: Will Phillips for Freddie Mac. I think
6 your Honor is exactly right. It's a jury question. The only
7 date that is not in dispute by which all curative information
8 was out there is when the details -- the extensive details of
9 the statement of release of November 21st. That is --

10 THE COURT: -- argue for a later date.

11 MR. PHILLIPS: No rational argument for a later date,
12 and there's a rational argument for dates all in between that
13 there are disclosures made.

14 THE COURT: What are they?

15 MR. PHILLIPS: There is starting in January, the
16 individual defendants pointed out that we disclosed the need
17 for a sizable restatement and the volatility of the stock in
18 January. In June, we disclosed the fact --

19 THE COURT: When you say sizable, was the word
20 "material" used?

21 MR. PHILLIPS: Material, yes, sir, your Honor. And
22 significant volatility in the stock was disclosed in January
23 2003. In June 2003 --

24 THE COURT: -- the theory --

25 MR. PHILLIPS: Yes, your Honor.

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ARGUMENT

1 THE COURT: A steady Freddie theory.

2 MR. PHILLIPS: Exactly, your Honor. In June 2003,
3 there were disclosures not only of the management terminations
4 but also later on in the SEC investigation. And on June 25th,
5 a few weeks later, there was a disclosure of how big the
6 statement was going to be. It was going to be an upwardly
7 statement of up to four and a half billion dollars.

8 On July 23rd, the Baker Botts -- which their witness
9 found very important. It was the one that detailed all of the
10 allegations, supposedly, of fraud. It's the one that they
11 pretty much took and made their complaint from. In fact, if
12 you hold the Baker Botts report up and the complaint up, you'll
13 see that they're largely very similar.

14 When you go later on, then there are disclosures that
15 happened in September and October, and then finally, there's
16 the definitive disclosure of what restatement is, how the stock
17 went up and how the earnings went up and down for different
18 periods, what the reasons were for the restatement, the exact
19 effect upon the financials of the company. And after that
20 time, there are no more disclosures related to this incident
21 that have any impact on it, and that's the reason, your Honor,
22 it's a jury question. They may convince a jury that June
23 6th -- or June 9th is the important --

24 THE COURT: Their biggest argument is that the stock
25 was not depreciated in value significantly as of June.

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ARGUMENT

1 MR. PHILLIPS: But, your Honor, the fact of the matter
2 is our biggest argument is that the stock drop had nothing to
3 do with these disclosures, and that's a jury question as well.
4 And in fact, the --

5 THE COURT: Other market conditions.

6 MR. PHILLIPS: As their own witness says, look, the
7 business fundamentals were great. We bought 171,000 shares
8 when the stock dropped. We thought it was a great buy. The
9 company was healthy. Those are all things that should go to
10 the jury. And that's what the Second Circuit and the Supreme
11 Court said, as your Honor knows.

12 So, your Honor, we posit that the broadest class
13 should be the one that's certified. It makes the most --

14 THE COURT: What do you have to say about the fact
15 that they should be foreclosed and taken out of the lead?

16 MR. PHILLIPS: Your Honor, you're a better lawyer than
17 I am.

18 THE COURT: I'm not sure I am.

19 MR. PHILLIPS: I would have put it in there if I
20 thought of it. I think it's a very good argument. I think
21 that they did benefit from the fact because they are subject
22 to --

23 THE COURT: Let's assume I certify the class as of a
24 later date. Do you still object to them being the class --

25 MR. PHILLIPS: No, your Honor. We will not object to

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ARGUMENT

1 that, although I do think that their purchase of stock is
2 relevant to the basic underlying fact of whether this was a
3 disclosure that -- because I think that their own purchase of
4 that stock shows, in fact, market professionals knew that this
5 company was a very healthy, profitable company --

6 THE COURT: But you're perfectly happy to
7 cross-examine them.

8 MR. PHILLIPS: I'm perfectly happy to cross-examine
9 them.

10 THE COURT: It doesn't affect your class action.

11 MR. PHILLIPS: No. And indeed, your Honor, as I'll
12 say, I think --

13 THE COURT: So unique defenses -- you'd rather live
14 with them than not have them.

15 MR. PHILLIPS: That's exactly right, your Honor, and I
16 think it's a jury question in the end. It's a jury question as
17 to which one is the proper curative disclosure, and no matter
18 how you argue about it, that's what the case law says, and what
19 the case law also says is that's not an issue you determine in
20 class certification. If it is, then I think we should all have
21 a factual hearing, but in fact, that's not what it's about.
22 What it's about, from Eisenhorn on down, is that the Court
23 isn't supposed to look at the merits.

24 THE COURT: I think you're right. I don't think I
25 have the power to certify the class action as of the longer

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ARGUMENT

1 date so long as there's a rational basis for a jury finding a
2 later date. So therefore, I'm going to leave it for the jury
3 to determine that question. I'll certify the class as of the
4 later date, and I will allow you to be the class action
5 representative if you continue to want to be.

6 MR. PHILLIPS: Thank you, your Honor.

7 THE COURT: Since he's not objecting to -- unique
8 defenses anymore. All right?

9 MR. PHILLIPS: Thank you, your Honor.

10 THE COURT: Except you have to send out the notice to
11 the class now. Right?

12 MR. BERGER: Yes, your Honor. We have to send a
13 notice to the class.

14 THE COURT: I don't think I have any other choice but
15 to do that.

16 MR. BERGER: Okay. If I --

17 THE COURT: Let's face it. These cases usually wind
18 up settling in the long run anyway, and so at least you'll have
19 the parameters of settlement laid down anyway. You'll both
20 have a little bit to bargain with.

21 MR. BERGER: Your Honor, I'm just referring to the AMF
22 Bowling case, and that case said -- I'm paraphrasing here -- on
23 motions for class certification, the Court must accept all of
24 the plaintiff's allegations as true and may not resolve
25 substantial issues of fact going to the merits when deciding

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ARGUMENT

1 the scope of the time limit of the class.

2 And so I suppose what we would say -- and I think that
3 this is what the courts generally --

4 THE COURT: Which allegation of yours should I accept
5 as true, the ones you have made on the lead plaintiff motion or
6 the ones you are making now? There's been an inconsistency,
7 you know.

8 MR. BERGER: I'm only talking about the complaint,
9 your Honor, the complaint that you sustained. And I don't
10 think -- you do an investigation, you know, you move for a lead
11 plaintiff. We did not have any particular responsibility at
12 that time to the class. We only had responsibility to
13 ourselves. Now, of course, we have a fiduciary duty to the
14 class. We prepared an amended complaint which your Honor
15 sustained. It contained a class period. Okay. Your Honor
16 yourself at the motion to dismiss recognized at that time that
17 that's when these people were --

18 THE COURT: But does the plaintiff define a class
19 action period?

20 MR. BERGER: The complaint does, yes.

21 THE COURT: I don't think I'm required to accept those
22 allegations as true.

23 MR. BERGER: I'm sorry, your Honor?

24 THE COURT: I don't think I'm required to accept those
25 allegations as true.

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ARGUMENT

1 MR. BERGER: No. No.

2 THE COURT: Because they don't go to the elements of
3 the cause of action.

4 MR. BERGER: No. But what I'm saying is, your Honor,
5 is that your Honor is going to be -- from a public policy
6 standpoint, your Honor is going to be faced with -- in every
7 class action case with defendants -- whole groups of diverse
8 defendants that are going to come in --

9 THE COURT: I haven't had a case like this where the
10 disclosures were coming in such a continuous and neverending
11 stream and where your own witnesses said you still thought it
12 was a pretty good buy.

13 MR. BERGER: Well, your Honor, but I just want to
14 address that. In other words, isn't --

15 THE COURT: Your own witnesses put in -- your claim
16 that all the inflation was out of the stock. They thought it
17 was a good buy.

18 MR. BERGER: But if the stock trades for --

19 THE COURT: You're a good lawyer, but you can't make
20 a --

21 MR. BERGER: Well, your Honor knows the fact that
22 whatever class you certify, that certainly at the very least --
23 that certainly at the very least, declines in the price of the
24 stock during the course of the class period when disclosures
25 come out, partial disclosures, when they come out during the

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ARGUMENT

1 course of the class period are relevant, because if the stock .
2 loses, if the stock goes from, let's say, 20 to 15 --

3 THE COURT: Well, what is the curative disclosure
4 date, so far as -- in effect, getting all the inflation out of
5 the stock is traditionally and consistently a question of fact.
6 That is true, unless it's not disputed, and here it is. And
7 this is a very unique case. This stuff is coming out over a
8 year, you know.

9 MR. BERGER: It's still coming out, your Honor.

10 THE COURT: You can make an argument that the class
11 shouldn't be over as of January when they said when there were
12 material changes being made. If we had a statute of
13 limitations question as to whether this was brought within one
14 year of the time that you knew or shouldn't have known of the
15 fraud, believe me, an argument can be made that you should have
16 brought it within a year of January. That was enough to put
17 you on inquiry that there was something wrong here. So it all
18 depends on -- but I think you would be arguing then that it's
19 an initial fact as to where that statute -- when in fact
20 disclosure was made. This case is a very unusual case. I
21 don't think I've ever had one like it.

22 All right. So that's my ruling anyway. So I'll
23 certify the class and submit an appropriate order.

24 And when do we have to deal with the question of
25 notice?

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ARGUMENT

1 MR. PHILLIPS: We'll work with counsel to get all
2 these issues resolved, your Honor.

3 THE COURT: You want another conference in 30 days?

4 MR. BERGER: Sure.

5 MR. PHILLIPS: Yes, your Honor. That's fine. Yes.

6 THE COURT: All right. What day, Linda?

7 THE DEPUTY CLERK: At the end of April, we have
8 Tuesday, April 25th at 3:00.

9 THE COURT: All right. We'll see you then,
10 Mr. Berger.

11 MR. BERGER: Thank you, your Honor.

12 THE COURT: Good argument. You did the best you
13 could, but I don't think you could persuade me that the Court
14 of Appeals will not take another view of it.

15 MR. BERGER: I'm done now. I can't continue. Is that
16 right?

17 MR. PHILLIPS: Thank you, your Honor.

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